No.

Supreme Court, U.S.
FILED

971997 JUN 2 1998

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION,

Petitioner,

vs.

VIRGINIA M. MARQUES,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

JAMES N. ROETHE
KENNETH D. HOFFMAN
JAY J. PRICE
OFFICE OF THE
GENERAL COUNSEL
BANK OF AMERICA NATIONAL
TRUST AND SAVINGS ASSOCIATION
555 California Street
8th Floor
San Francisco, CA 94104
(415) 622-8709

ROBERT A. ROSENFELD
Counsel of Record
PATRICIA K. GILLETTE
WAYNE STEPHEN BRAVEMAN
CYNTHIA J. GRIFFITH
HELLER EHRMAN WHITE
& McAULIFFE
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

Of Counsel:
M. LAURENCE POPOFSKY
STEPHEN V. BOMSE

Attorneys for Petitioner

146766

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

52 pp

ISSUE PRESENTED FOR REVIEW

Section 24, Fifth of the National Bank Act, 12 U.S.C. § 24, gives the directors of national banks authority to dismiss bank officers "at [their] pleasure." For over a century, that statute — and analogous provisions of other federal banking statutes — have been held to preempt contrary state statutory and common law claims. Does the passage of Title VII of the Civil Rights Act of 1984, 42 U.S.C. §§ 2000e-2000e-17 and other recent civil rights statutes impliedly overrule that case law and allow a terminated bank officer to assert state law public policy tort and statutory discrimination claims?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Bank of America National Trust and Savings Association ("the Bank") is a wholly owned subsidiary of BankAmerica Corporation. The following are corporate subsidiaries or affiliates of the Petitioner that are or may be publicly held: BA Merchant Services, Inc.; Bank America Capital I; BankAmerica Capital II; BankAmerica Capital III; BankAmerica Capital IV; BankAmerica Institutional Capital A; BankAmerica Institutional Capital B; KorAm Bank; BA Lepanto (Philippines); Hong Kong and Shanghai Insurance Co. Ltd.; AArnBank Singapore; BA Savings Bank (Philippines); Inchroy Credit Corporation Ltd.; Foppingadreef Investments; and Debt Recovery Ltd. BankAmerica Corporation has announced its intention to merge with NationsBank Corporation which, subject to shareholder and regulatory approval, is expected to occur in the fourth quarter of 1998.

TABLE OF CONTENTS

	Page
Issue Presented for Review	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2
Reason for Granting the Writ	3
Certiorari Should Be Granted To Address The Relationship Between The Principles Of Repeal By Implication And Implied Preemption And To Resolve The Recurring Conflict Over Whether Bank Officers May Assert State Law Discrimination Claims.	3
Conclusion	16

TABLE OF CITATIONS

Cases: *Page*

Aalgaard v. Merchants Nat'l Bank,
224 Cal. App. 3d 674 (1990) 5, 14

Ambro v. American Nat'l Bank & Trust Co.,
394 N.W. 2d 46 (Mich. Ct. App. 1996) 4

Ana Leon T. v. Federal Reserve Bank of Chicago,
823 F.2d 928 (6th Cir. 1987) 14

Berube v. Fashion Center Ltd.,
771 P.2d 1033 (Utah 1989) 12

Bollow v. Federal Reserve Bank of San Francisco,
650 F.2d 1093 (9th Cir. 1981) 4

California Federal Sav. & Loan Ass'n v. Guerra,
479 U.S. 272 (1987) 7

Cilley v. New Hampshire Ball Bearings, Inc.,
614 A.2d 818 (N.H. 1986) 12

City Nat'l Bank v. Brown,
599 So. 2d 787 (La. Ct. App. 1992) 5

Confer v. Federal Home Loan Bank,
649 N.E. 2d 476 (Ill. App. Ct. 1995) 5

County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation,
502 U.S. 251 (1992) 6

TABLE OF CITATIONS
(Continued)

Page

Glaz v. Ralston Purina Co.,
509 N.E. 2d 297 (Mass. App. Ct. 1987) 12

Holland v. Bank of America,
673 F. Supp. 1511 (S.D. Cal. 1987) 4

Inglis v. Feinerman,
701 F.2d 97 (9th Cir. 1983) 14

Johnson v. McDonnel Douglas Corp.,
745 S.W. 2d 661 (Mo. 1988) 12

Kelly-Zurian v. Wohl Shoe Co.,
22 Cal. App. 4th 397 (1994) 12

Kemper v. First Nat'l Bank in Newton,
418 N.E. 2d 819 (Ill. App. Ct. 1981) 5

Kispert v. Federal Home Loan Bank of Cincinnati,
778 F. Supp. 950 (S.D. Ohio 1991) 14

Kozlowsky v. Westminster Nat. Bank,
6 Cal. App. 3d 593 (1970) 5

Mackey v. Pioneer Nat'l Bank, 867 F.2d 520
(9th Cir. 1989) 4, 11

Mardula v. Rancho Dominguez Bank,
43 Cal. App. 4th 790 (1996), *cert. denied*,
117 S. Ct. 1106 (1997) 4, 5, 11, 14

TABLE OF CITATIONS

(Continued)

Page

Marques v. Bank of America, NT&SA,
59 Cal. App. 4th 356 (1998) 1

McClung v. Marion County Comm'n,
360 S.E. 2d 221 (W. Va. 1987) 12

McGeehan v. Bank of New Hampshire, Nat'l Ass'n,
455 A.2d 1054 (N.H. 1983) 5

Moodie v. Federal Reserve Bank of New York,
831 F. Supp. 333 (S.D.N.Y. 1993) 15

Mueller v. First Nat'l Bank of The Quad Cities,
797 F. Supp. 656 (C.D. Ill. 1992) 5

Obradovich v. Federal Reserve Bank of New York,
569 F. Supp. 785 (S.D.N.Y. 1983) 4

Osei-Bonsu v. Federal Home Loan Bank of New York,
726 F. Supp. 95 (S.D.N.Y. 1989) 14

Posadas v. National City Bank,
296 U.S. 497 (1935) 6

Radzanower v. Touche Ross & Co.,
426 U.S. 148 (1976) 6

Rankin v. Tygard,
198 F. 795 (8th Cir. 1912) 4

Schriner v. Meginnis Ford Co.,
421 N.W. 2d 755 (Neb. 1988) 12

TABLE OF CITATIONS

(Continued)

	Page
Schultz v. Production Stamping Corp., 434 N.W. 2d 780 (Wis. 1989)	12
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)	13, 14
Siddoway v. Bank of America, 748 F. Supp. 1456 (N.D. Cal. 1990)	4
Silver v. New York Stock Exchange, 373 U.S. 341 (1963)	6
Smith v. Electronic Sys. Div. Of Bristol Corp., 557 N.E. 2d 711 (Ind. Ct. App. 1990)	12
Sugarcane v. RCA Corp., 639 F. Supp. 780 (M.D. Pa. 1985)	12
Thompson v. Thompson, 484 U.S. 174 (1988)	7
Virginia M. Marques v. Bank of America National Trust and Savings Association, No. C-96-1932 (TEH) (N.D. Cal.)	2
Wells Fargo Bank v. Superior Court, 53 Cal. 3d 1082 (1991)	4
Westervelt v. Mohrenstecher, 76 F. 118 (8th Cir. 1896)	4

TABLE OF CITATIONS
(Continued)

Page

Statutes:

12 U.S.C. § 24, Fifth ..... *passim*

12 U.S.C. § 226 10

12 U.S.C. § 341 ..... 2, 4, 5, 10

12 U.S.C. §§ 1421-1447 10

12 U.S.C. § 1432 2

12 U.S.C. § 1432(a) 4, 5, 10

28 U.S.C. § 1257(a) 1

29 U.S.C. § 206 2

29 U.S.C. § 206(d)(1) 5

29 U.S.C. §§ 621-634 ..... 2, 5

29 U.S.C. § 623 2

29 U.S.C. § 1144(d) 14

42 U.S.C. § 1981a(b)(3) 12

42 U.S.C. §§ 2000e-2000e-17 ..... 1, 2, 5

42 U.S.C. § 2000e-2 2

TABLE OF CITATIONS

(Continued)

	Page
42 U.S.C. § 2000e-7	13
42 U.S.C. § 2000e(b)	12
Cal. Govt. Code § 12900	2
Cal. Govt. Code §§ 12900-12996	1
Cal. Gov't Code § 12926(d)	12
Cal. Gov't Code § 12940(h)(1)	12
Cal. Gov't Code § 12941(a)	12
Cal. Gov't Code § 12970	12
Cal. Labor Code § 1197.5	1, 2

APPENDICES

Page

Appendix A — Opinion Of The Court Of Appeal Of The State Of California For The First Appellate District, Division Two Filed November 19, 1997 ..... 1a

Appendix B — Order Of The Superior Court Of The State Of California In And For The City And County Of San Francisco Filed February 6, 1996 ..... 12a

Appendix C — Order Of The Supreme Court Of California Denying Petition For Review Filed March 11, 1998 ..... 16a

Appendix D — Statutory Provisions Involved 17a

Petitioner Bank of America National Trust and Savings Association ("the Bank") seeks a writ of certiorari to review the final decision of the California Court of Appeal, partially reversing summary judgment in Petitioner's favor. Appendix ("App.") at 1a-11a. The California Supreme Court has denied review. App. at 16a.

The Court of Appeal concluded that Section 24, Fifth of the National Bank Act ("NBA"), 12 U.S.C. § 24, Fifth ("Section 24, Fifth"), which grants national banks authority to dismiss bank officers "at pleasure," was partially repealed by implication by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 and related federal civil rights statutes. As a result, the court held that the NBA no longer preempts Respondent Virginia Marques' state law claims that her dismissal as an officer of the Bank: (1) constituted a common law tort in violation of California public policy; (2) violated the anti-discrimination provisions of California's Fair Employment and Housing Act (Cal. Govt. Code §§ 12900-12996) ("FEHA"); and (3) violated California's Equal Pay Act (Cal. Labor Code § 1197.5). App. at 1a-11a.

OPINIONS BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Two, is reported as *Marques v. Bank of America, NT & SA*, 59 Cal. App. 4th 356 (1998), and reproduced in Appendix A at pp. 1a-11a. The order of the Superior Court in and for the City and County of San Francisco appears in Appendix B at pp. 12a-15a. The order of the California Supreme Court denying review appears in Appendix C at p. 16a.

STATEMENT OF JURISDICTION

The California Supreme Court denied review on March 11, 1998. App. C at 16a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The following relevant statutes are reproduced in Appendix D: (a) National Bank Act, 12 U.S.C. § 24 (1998); Federal Reserve Bank Act, 12 U.S.C. § 341 (1998); Federal Home Loan Bank Act, 12 U.S.C. § 1432 (1998); Federal Age Discrimination in Employment Act, 29 U.S.C. § 623 (1998); Federal Equal Pay Act, 29 U.S.C. § 206 (1998); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1998); California Fair Employment and Housing Act, Cal. Gov't Code § 12900 (1997); California Equal Pay Act, Cal. Labor Code § 1197.5 (1997).

STATEMENT OF THE CASE

Respondent Virginia Marques was employed by petitioner until 1994, when her position was eliminated. Because Marques was a bank officer, she was terminated under the authority of Section 24, Fifth of the NBA, which grants national banks the authority to dismiss bank officers at their discretion. Marques then filed a complaint in California state court alleging several state law causes of action: (a) in tort for wrongful termination in violation of public policy; (b) for unlawful discrimination based on age, sex and national origin in violation of FEHA; (c) for violation of the California Equal Pay Act; (d) for breach of contract; and (e) for breach of the implied covenant of good faith and fair dealing.[1] *See* App. at 2a.

Petitioner successfully moved for summary judgment on the ground that each of Marques' state law claims was preempted by Section 24, Fifth. App. 12a-15a.

---

[1] In a separate action, pending in the Northern District of California, Marques alleges that her dismissal also violated Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. §§ 2000e-2000e-17, the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, and the federal Equal Pay Act, 29 U.S.C. § 206. *Virginia M. Marques v. Bank of America, National Trust and Savings Association*, No. C-96-1932 (TEH) (N.D. Cal.).

The California Court of Appeal reversed the summary judgment as to all claims except the contract claims. It reasoned that prior case law holding that Section 24, Fifth preempts state common law and statutory employment discrimination claims was implicitly vitiated by the enactment of Title VII (and other similar federal civil rights statutes). In the court's view, passage of these later statutes partially repealed Section 24, Fifth by implication, thereby allowing terminated bank officers to assert *federal* discrimination claims. That being the case, the court found that the rationale for continuing to give preemptive effect to Section 24, Fifth over state law public policy tort and statutory discrimination claims was also vitiated. The court concluded that by allowing federal discrimination claims, Congress effectively eliminated any conflict in the "objectives" of federal and state policy and further diminished any federal interest in applying a uniform standard to national banks with respect to retention of their officers. App. at 8a-10a.

The California Supreme Court denied review. App. 16a.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO ADDRESS THE RELATIONSHIP BETWEEN THE PRINCIPLES OF REPEAL BY IMPLICATION AND IMPLIED PREEMPTION AND TO RESOLVE THE RECURRING CONFLICT OVER WHETHER BANK OFFICERS MAY ASSERT STATE LAW DISCRIMINATION CLAIMS.

For well over a century, federal law has provided that officers of national banking associations serve at the "pleasure" of their respective employers' boards of directors. *See* 12 U.S.C. § 24, Fifth.[2] Other federally-regulated financial institutions have long

[2] Section 24, Fifth states that national banks shall have the power:

> To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their

(continued)

had similar authority. *See* 12 U.S.C. § 341 (enacted in 1913) (federal reserve banks); 12 U.S.C. § 1432(a) (enacted in 1932) (federally chartered thrift institutions).

For substantially that same period, federal and state courts have unanimously held that this standard is intended to operate uniformly throughout the nation, and under the Supremacy Clause, preempts state employment law.[3]

(continued)

> duties, require bonds of them and fix the penalty thereof, *dismiss such officers or any of them at pleasure*, and appoint others to fill their places.

12 U.S.C. § 24, Fifth (emphasis added).

[3] *See, e.g., Westervelt v. Mohrenstecher*, 76 F. 118, 122-23 (8th Cir. 1896) (Section 24, Fifth precludes employment contracts between bank and its officers that are contrary to its dismissal "at pleasure" provision); *Rankin v. Tygard*, 198 F. 795, 798-99 (8th Cir. 1912) (Section 24, Fifth requires implied condition in any contract between national bank and its officers that they may be dismissed "at pleasure" of bank's board of directors); *Wells Fargo Bank v. Superior Court*, 53 Cal. 3d 1082, 1087-88 (1991) ("It has been established for almost a century that [S]ection 24 [, Fifth] preempts all state law causes of action by a bank officer for breach of an employment agreement. . . . We are aware of no decision to the contrary. . . ."). *See also Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 525-26 (9th Cir. 1989) (citing cases; contract and tort claims preempted); *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1098 (9th Cir. 1981) (analogous provision of Federal Reserve Act preempts state law tort and contract claims); *Siddoway v. Bank of America*, 748 F. Supp. 1456, 1461 (N.D. Cal. 1990) (same); *Holland v. Bank of America*, 673 F. Supp. 1511, 1516-17 (S.D. Cal. 1987) (same); *Obradovich v. Federal Reserve Bank of New York*, 569 F. Supp. 785, 790 (S.D.N.Y. 1983) (analogous provision of Federal Reserve Act preempts implied contract claims); *Ambro v. American Nat'l Bank & Trust Co.*, 394 N.W. 2d 46, 48-49 (Mich. Ct. App. 1996) (claims for wrongful discharge, negligence and breach of good faith preempted); *Mardula v. Rancho Dominguez Bank*, 43 Cal. App. 4th 790, 793-94 (1996), *cert. denied*, 117 S. Ct. 1106 (1997) (breach of contract, oral contract, implied contract, covenant of good faith and fair dealing, public policy tort and statutory discrimination claims preempted);

(continued)

Were there nothing more, application of these principles would dispose of respondent's state law claims in this case. However, beginning in the mid-1960's, Congress for the first time enacted statutes directed to the employment practices of private, non-federal employers. *See, e.g.*, 42 U.S.C. §§ 2000e-2000e-17 (Title VII); 29 U.S.C. §§ 621-634 (Age Discrimination In Employment Act); 29 U.S.C. § 206(d)(1) (Equal Pay Act). In enacting these statutes, Congress did not say anything about their intended interplay with Section 24, Fifth of the NBA or with other federal banking statutes which contain analogous provisions.

In the face of this uncertain legislative record, several courts have held that the *federal* banking and civil rights statutes — laws of equal dignity — must be reconciled by reading Section 24, Fifth to accommodate the requirements of the more recent federal civil rights laws.[4] That is, the "at pleasure" language in Section 24, Fifth is deemed to have been impliedly repealed by subsequent federal civil rights statutes. As a consequence, dismissed bank

---

(continued)

Confer v. Federal Home Loan Bank, 649 N.E. 2d 476, 478 (Ill. App. Ct. 1995) (state law claim for retaliatory discharge preempted); *City Nat'l Bank v. Brown*, 599 So. 2d 787 (La. Ct. App. 1992) (state law wrongful termination claim preempted); *Aalgaard v. Merchants Nat'l Bank*, 224 Cal. App. 3d 674, 689-90 (1990) (contract, tort and public policy tort claims preempted); *McGeehan v. Bank of New Hampshire, Nat'l Ass'n*, 455 A.2d 1054, 1055-56 (N.H. 1983) (state law claims preempted); *Kemper v. First Nat'l Bank in Newton*, 418 N.E. 2d 819, 820-21 (Ill. App. Ct. 1981) (breach of contract and wrongful termination claims preempted); *Kozlowsky v. Westminster Nat. Bank*, 6 Cal. App. 3d 593, 596-97 (1970) (breach of contract claims preempted).

[4] *See, e.g., Mueller v. First Nat'l Bank of The Quad Cities*, 797 F. Supp. 656, 663 (C.D. Ill. 1992) (dismissed bank officers may assert federal ADEA and ERISA claims); *Mardula*, 43 Cal. App. 4th at 793 ("[T]he cases demonstrate that [S]ection 24 [Fifth], and similar provisions covering employees of Federal Reserve Banks (12 U.S.C. § 341) and federally chartered thrift institutions (12 U.S.C. § 1432(a)) . . . do not . . . appear to bar claims that the discharge violated federal anti-discrimination statutes.") (citations omitted).

officers may assert *federal* discrimination claims, since the two sets of laws on their face are not otherwise capable of coexisting and Congress did not specify how the pre-existing statute (Section 24, Fifth of the NBA) was to be interpreted in light of later federal anti-discrimination laws.

Those holdings give rise to the issue presented by this case: Whether the implied partial repeal of Section 24, Fifth by subsequent federal civil rights statutes *also* affects the relevant *preemption* analysis? In other words, in enacting Title VII (and similar federal civil rights statutes), did Congress — without saying so — not only intend to modify *substantive* federal employment law applicable to officers of national banking associations, but *also* to eradicate decades of case law holding that Section 24, Fifth preempts state law claims by dismissed bank officers?

Resolution of this question presents an important, and unresolved, conflict between two well-recognized principles of statutory interpretation: repeal by implication and implied preemption. This Court has observed repeatedly that "it is a cardinal rule . . . that repeals by implication are not favored." *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 262 (1992). Such repeals will be inferred only where two federal statutes are otherwise irreconcilable and, then, only to the narrowest extent necessary to harmonize competing statutory schemes.[5]

The reasons for this judicial reluctance are surely evident. By definition, the exercise involves the construction of legislative intent where there is no evidence that the issue was, in fact,

---

[5] *See Posadas v. National City Bank*, 296 U.S. 497, 503 (1935) ("where provisions in the two acts are in irreconcilable conflict, the latter act to the extent of the conflict constitutes an implied repeal of the earlier one"); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976) ("'Repeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary. . . .'") (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) (brackets in original).

considered or even recognized by Congress. It is, thus, an exercise in judicial necessity, but one which becomes an illicit encroachment upon the legislative prerogative if extended beyond narrow bounds.

The Court of Appeal in this case followed a different course. In its view, the controlling canon of construction is not the presumption against implied repeal, but the presumption against implied preemption. "[P]re-emption," said the court, "is not to be lightly presumed." App. at 4a (quoting *California Federal Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987)).

Having thus declared itself free of the constraints of statutory language, decades of case law holding that Section 24, Fifth preempts state employment law,[6] or the need to avoid usurping the legislative function, the Court of Appeal undertook to assess, for itself, the purported objectives of state and federal employment law, considered in their "fullest sense." App. at 10a. According to the court, the enactment of Title VII "effectively vitiated any . . . conflict" between state and federal law on "the subjects" of employment discrimination. Hence, "there is simply no conflict between federal law (*considered in its fullest sense*) and California's [laws on the same subject]." App. at 9a-10a (emphasis added).[7]

---

[6] *See Thompson v. Thompson*, 484 U.S. 174, 180-81 (1988) (statutory construction includes consideration of existing case law at the time Congress enacted the statute at issue, as part of the backdrop against which Congress acts).

[7] The Court of Appeal effectively treated passage of Title VII as if it were an amendment *of the NBA itself* rather than an entirely separate statute. Had Congress, in fact, amended Section 24, Fifth of the NBA to add language comparable to Title VII, the relevant preemption analysis might well be different. While the issue still would be whether Congress thereby intended to preempt state law, notwithstanding a failure to so provide, that question would be answered by considering the hypothetically amended NBA (including its inclusion of the new non-discrimination language) by reference

(continued)

Petitioner submits that the Court of Appeal's approach was fundamentally misguided. And, most important for present purposes, its error matters.

A.

Had the Court of Appeal been more respectful of the legislative function and the appropriate limits of judicial review, it would have reached a different result. Prior to enactment of Title VII, officers of a national bank served at the pleasure of the bank's board of directors. However, after 1964, that unfettered discretion could not be squared entirely with the provisions of Title VII which place certain grounds for termination out of bounds *as a matter of federal law*. Even though Title VII says nothing directly about the validity *vel non* of Section 24, Fifth of the NBA, the two statutes, literally read, cannot fully coexist.

Thus, to the limited extent necessary to harmonize the two federal acts, the application of recognized canons of statutory construction implies a congressional intention to modify or repeal in part the prior statute. However, nothing in that analysis requires (or suggests the propriety of) going beyond the narrow limits necessary to harmonize Title VII (and other federal civil rights statutes) and Section 24, Fifth (and analogous federal banking laws) by also allowing a terminated bank officer to claim that his or her dismissal also violates *state* anti-discrimination law.

Another way of making the same point is that Section 24 Fifth, in effect, embodies two *separate* federal legislative judgments:

(continued)
to the *changed* statutory objectives of the NBA. By contrast, where, as here, Congress enacts a subsequent independent statute which conflicts with earlier legislation but does not amend it, a court may do no more than imply a Congressional intent to repeal or modify the earlier federal act to the limited extent necessary to harmonize the two statutes. *See* text, *supra*.

first, Congress' judgment as to the appropriate substantive standard for the retention and dismissal of bank officers, and, *second*, Congress' intention that this substantive standard — whatever its content — be applied uniformly, to the exclusion of state law. Passage of Title VII and other federal civil rights laws altered the *substantive* standard for the retention of bank officers by restricting the grounds on which they might be dismissed to the extent provided by those federal civil rights laws.

However, that modification does not speak at all to the separate issue of uniformity. That latter requirement — which has been consistently held to cause Section 24, Fifth to preempt state law — remains every bit as much an affirmative command of the federal banking statutes *after* enactment of Title VII (and related civil rights laws) as it was before. *See* pp. 10-12, *infra*.[8]

The problem with the Court of Appeal's focus on the broader "subject" or "objectives" of California and federal law is that nothing in the passage of Title VII or other civil rights laws provides it with warrant to address that issue in the first instance. The court's approach was, to the contrary, a pure exercise in judicial usurpation of the legislative function. It may be that there is no longer a need to preserve a separate or uniform rule for the retention of national bank officers.[9] However, as the Court of Appeal below

---

[8] The Court of Appeal's only discussion of the uniformity issue was to observe that with the passage of the federal civil rights laws any federal interest in uniformity had been "diminished." App. at 8a. But this reasoning erroneously assumes that the federal civil rights laws carry with them state public policy tort and statutory anti-discrimination law. That premise is mistaken. As we explain in text, the fact that recent federal statutes such as Title VII must be harmonized with the NBA does not speak at all to the separate question of whether the standard for retention of national bank officers ought to remain uniform and therefore preemptive of state law.

[9] Though we dispute it. *See* pp. 10-12, *infra*.

paradoxically recognized (App. at 8a n.5), that is a judgment to be made by Congress, not the courts, let alone by fifty separate state judicial systems.

Put otherwise, Congress did not write on a clean slate — preemption-wise — when it enacted Title VII and other federal civil rights statutes. While passage of those statutes may necessitate resort to the implied repeal doctrine to the limited extent necessary to harmonize competing federal statutes (the federal banking and civil rights laws), it does not call for (or allow) reassessment of the long-standing rule that Congress intended a uniform national approach to the retention and dismissal of bank officers that promotes the safety and soundness of financial institutions, or justify a judicial redefinition of the interplay between federal and state employment law for federally-regulated banks generally.

B.

The decision to grant national banks broad discretion over employment issues reflects a clear and purposeful policy choice by Congress. Far from being an isolated or unique statutory provision, Congress has included parallel language in other federal banking statutes. *See* 12 U.S.C. § 341 (federal reserve banks); 12 U.S.C. § 1432(a) (federally chartered thrift institutions). Moreover, notwithstanding many other amendments to the NBA and other federal banking laws over the past thirty years — subsequent to the enactment of Title VII and related civil rights laws — Congress has left Section 24, Fifth and the analogous provisions of other federal banking laws unchanged.[10]

The inclusion of parallel language in these other federal banking statutes, as well Congress' failure to modify Section 24,

[10] *See, e.g.*, 12 U.S.C.A. § 24 (May 1997 Supp.) at 513 (summary history of amendments to NBA); 12 U.S.C.A. § 226 (1989) at 39-41 (summary history of amendments to Federal Reserve Act); 12 U.S.C.A. §§ 1421-1447 (1989) at 522-622 (summary history of amendments to each section of the Federal Home Loan Bank Act).

Fifth in connection with any of its post-1964 revisions to the NBA, underscores the purposeful nature of the relevant statutory language. This Congressional decision reflects, as well, the special role played by federally-chartered banks and the need to preserve public confidence in the banking system.[11]

It also would be inappropriate to conclude, as a policy matter, that because national banks are subject to Title VII and other federal civil rights laws, there no longer is any reason to maintain the NBA's preemption of *state* anti-discrimination law. These are quite separate issues.

It does not follow that because Congress implicitly agreed to limit the discretion of national banks over their officers to the extent provided by Title VII (and related federal civil rights laws), Congress also thereby intended to impose on them the quite different, and varied, provisions of fifty states' employment laws. It is one thing to subject national banks to a uniform federal obligation to refrain from discriminating on the basis of, *e.g.*, race or gender, and quite another to subject them to the vagaries of state and local statutes and common law that impose a variety of requirements on the evaluation of employment decisions differing from, and in some cases going far beyond, those mandated by federal law.[12]

---

[11] *See Mackey*, 867 F.2d at 526 (policies underlying Section 24, Fifth include "giv[ing federal financial] . . . institutions the greatest latitude possible to hire and fire their . . . officers, in order to maintain the public trust."); *Mardula*, 43 Cal. App. 4th at 793-94 (Section 24, Fifth "implement[s] a forceful policy that a nationally chartered bank must be free to remove and replace its officers at will. . . . '[I]t is essential to the safety and prosperity of banking institutions that the active officers, to whom integrity and discretion the moneys and property of the bank and its customers are entrusted, should be subject to immediate removal whenever even the suspicion of faithlessness or negligence attaches to them.' . . . The policy is one of long standing; the 'at pleasure' language has been in the statute for 131 years.").

[12] California law is illustrative: (a) Title VII places strict limits on the nature and (continued)

As noted above, whatever the debate about the necessity of continuing to provide national banks with greater discretion over employment decisions than is afforded to other employers, that is a judgment for Congress, not the judiciary, to make. Moreover, it is a judgment that Congress has made. Absent clear Congressional intention to reexamine that judgment, there is no basis for a California Court of Appeal, or any other court for that matter, to do so.

(continued)
amount of compensatory damages. 42 U.S.C. § 1981a(b)(3). California law, however, sets no such limits. Cal. Gov't Code § 12970. (b) Title VII's cap on available damages includes a strict limit on punitive damages. 42 U.S.C. § 1981a(b)(3). California law contains no limits on punitive (or other) damages. Cal. Gov't Code § 12970. (c) Title VII generally imposes a "knew or should have known" standard for imposing employer liability. California law imposes strict liability on an employer for the conduct of its supervisors who are managing agents. *See Kelly-Zurian v. Wohl Shoe Co.*, 22 Cal. App. 4th 397, 405 (1994). (d) Title VII does not provide for individual liability. 42 U.S.C. § 2000e(b); California law allows individual liability. Cal. Gov't Code §§ 12926(d), 12940(h)(1), 12941(a). State public policy tort claims and federal anti-discrimination law are similarly in conflict. There is no federal analogue to such tort claims. Moreover, whether a state's common law recognizes public policy tort claims — and, if so, the contours of such claims and the type of relief available — are matters left to that state's courts. Thus, public policy tort claims vary widely from state to state, and are subject to change by evolving court decisions. *Compare, e.g., Schriner v. Meginnis Ford Co.*, 421 N.W. 2d 755 (Neb. 1988) (public policy tort claim requires that challenged dismissal violates a specific statutory or constitutional provision); *Johnson v. McDonnel Douglas Corp.*, 745 S.W. 2d 661 (Mo. 1988) (same); *Schultz v. Production Stamping Corp.*, 434 N.W. 2d 780 (Wis. 1989) (same); *McClung v. Marion County Comm'n*, 360 S.E. 2d 221 (W. Va. 1987) (same); *Smith v. Electronic Sys. Div. Of Bristol Corp.*, 557 N.E. 2d 711 (Ind. Ct. App. 1990) (same) *with, e.g., Berube v. Fashion Center Ltd.*, 771 P.2d 1033 (Utah 1989) (no such requirement); *Glaz v. Ralston Purina Co.*, 509 N.E. 2d 297 (Mass. App. Ct. 1987); *Cilley v. New Hampshire Ball Bearings, Inc.*, 614 A.2d 818 (N.H. 1986) (same); *Sugarcane v. RCA Corp.*, 639 F. Supp. 780 (M.D. Pa. 1985) (same).

C.

The fact that Title VII expressly preserves state anti-discrimination statutes does not compel a different conclusion.[13] In fact, this Court previously addressed a closely analogous issue in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), which dealt with the preemptive effect of ERISA on pre-existing state statutes in light of Title VII.

In *Shaw*, plaintiffs argued that because Title VII preserves state anti-discrimination statutes and ERISA does not preempt Title VII, ERISA does not preempt state law. The Second Circuit rejected this "simplistic" argument, and this Court approved its reasoning, noting that "Title VII does not transform state fair employment laws into federal laws that [ERISA] . . . saves from ERISA preemption." 463 U.S. at 101 n.22.

Moreover, *Shaw* specifically held that in enacting Title VII, Congress did not — contrary to the Court of Appeal's reasoning in this case — affirmatively adopt as a *federal* policy the promotion of state anti-discrimination laws that provide *greater* protection than federal law:

> Appellants argue that pre-emption of the [New York] prohibition of pregnancy discrimination would impair Title VII because that law encourages [s]tates to enact

---

[13] Title VII's "savings clause" provides that:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

42 U.S.C. § 2000e-7.

> fair employment laws providing greater substantive protections than Title VII. . . . *We have found no statutory language or legislative history suggesting that the federal interest in state fair employment laws extends any farther than saving such laws from pre-emption by Title VII.*

Shaw, 463 U.S. at 103 n.24 (emphasis added).[14]

D.

The issue presented here is an important and unresolved one which this Court ought to address. However clear we may believe the appropriate analysis is — a view shared by the majority of courts which have considered the issue[15] — both the court below

---

[14] In *Shaw*, this Court did hold that certain aspects of state discrimination law were not preempted by ERISA because such preemption would impair the operation of Title VII. That issue was relevant only because Congress explicitly limited ERISA's broad preemptive impact so as not to "alter, amend, modify, invalidate, impair, or supersede any law of the United States." 29 U.S.C. § 1144(d). Here, by contrast, there is no similar statutory limit on NBA preemption. Thus, the only basis for concluding that the NBA does *not* preempt state anti-discrimination laws is the Title VII savings clause argument, which both the Second Circuit and this Court have rejected. *See* 463 U.S. at 101 n.22.

[15] *See Ana Leon T. v. Federal Reserve Bank of Chicago*, 823 F.2d 928, 931 (6th Cir. 1987) (analogous Federal Reserve Act dismissal provision preempts state law discrimination claims); *Inglis v. Feinerman*, 701 F.2d 97, 98 (9th Cir. 1983) (state law public policy tort claim preempted); *Kispert v. Federal Home Loan Bank of Cincinnati*, 778 F. Supp. 950, 952-53 (S.D. Ohio 1991) (analogous provision of Home Loan Bank Act preempts state law age discrimination, fraud and misrepresentation claims); *Osei-Bonsu v. Federal Home Loan Bank of New York*, 726 F. Supp. 95, 98 (S.D.N.Y. 1989) (analogous provision of Federal Home Loan Bank Act preempts state law discrimination claims); *Mardula*, 43 Cal. App. 4th at 793-94 (1996) (state law public policy tort and discrimination claims pre-empted); *Aalgaard*, 224 Cal. App. 3d 674 (1990) (state law discrimination claims preempted).

and one federal district court have reached a contrary conclusion.[16] There is, thus, a plain conflict on the issue that only this Court is capable of resolving.

As matters now stand, the issue is likely to arise in each of the fifty states. Federally regulated banks operate in every state, most states have statutory anti-discrimination laws, many recognize common law "public policy" torts, and employment termination disputes are a common subject of litigation. Moreover, with the several recently-announced mergers in the banking industry and the continued expansion of federally-regulated banks, the importance of preserving uniformity in an area where that has been declared Congresional policy for over 100 years takes on even greater significance.

---

[16] *See Moodie v. Federal Reserve Bank of New York*, 831 F. Supp. 333 (S.D.N.Y. 1993).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

ROBERT A. ROSENFELD
Counsel of Record
PATRICIA K. GILLETTE
WAYNE STEPHEN BRAVEMAN
CYNTHIA J. GRIFFITH
HELLER EHRMAN WHITE
& McAULIFFE
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

Of Counsel:

M. LAURENCE POPOFSKY
STEPHEN V. BOMSE

JAMES N. ROETHE
KENNETH D. HOFFMAN
JAY J. PRICE
OFFICE OF THE GENERAL COUNSEL
BANK OF AMERICA NATIONAL
TRUST AND SAVINGS ASSOCIATION
555 California Street
8th Floor
San Francisco, CA 94104
(415) 622-8709

Attorneys for Petitioner

APPENDIX

APPENDIX A

OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, DIVISION TWO FILED NOVEMBER 19, 1997

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION TWO

A073882, A074529

San Francisco County
Super. Ct. No. 966157

VIRGINIA M. MARQUES,

Plaintiff and Appellant,

v.

BANK OF AMERICA, NT & SA,

Defendant and Respondent.

I. INTRODUCTION

Virginia M. Marques appeals from a summary judgment in favor of her former employer, Bank of America. She contends the trial court erred in finding that all her claims were preempted by the National Bank Act.

II. FACTUAL AND PROCEDURAL BACKGROUND

On December 29, 1994, Marques filed a wrongful discharge complaint alleging that she was a 57-year-old Hispanic woman who had worked for Bank of America for 38 years, was promoted to Vice President in 1992, and terminated in 1994. She alleged causes of action for unlawful discrimination based on age, sex, and national origin under California's Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), as well as for violation of the state's Equal Pay Act (Lab. Code, § 1197.5), wrongful termination in violation of public policy (FEHA; Unemp. Ins. Code, § 2070 et seq.), breach of contract, and breach of the covenant of good faith and fair dealing. In its answer, the Bank asserted as an affirmative defense that all Marques's claims were preempted by section 24 (Fifth) of the National Bank Act (12 U.S.C. § 21 et seq.). On January 8, 1996, the Bank filed a motion for summary judgment on preemption grounds. After a hearing, the court granted the motion and entered judgment accordingly.

Thereafter, the Bank filed a memorandum of costs. After filing a timely notice of appeal from the judgment, Marques filed a motion to strike or tax costs, and a motion for sanctions (Code Civ. Proc., § 128.5). After a hearing, the trial court denied both motions. Marques's appeal from the postjudgment order has been consolidated with her appeal from the judgment.

III. DISCUSSION

"A defendant may show entitlement to summary judgment either by showing one or more elements of each cause of action cannot be established, or by establishing an affirmative defense. (Code Civ. Proc., § 437c, subd. (n).)" (*Marquez v. Mainframe*

(1996) 42 Cal.App.4th 881, 884.) "[O]n appeal of a summary judgment the proper standard is independent review — we examine the facts as presented to the trial court on a summary judgment motion and independently determine their effect as a matter of law. [Citations.]" *(Id.* at pp. 884-885.)

A. *National Bank Act Preemption*

The National Bank Act (NBA) gives a national banking association the power "[t]o elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, *dismiss* such officers or any of them *at pleasure,* and appoint others to fill their places." (12 U.S.C. § 24 (Fifth), italics added.) The trial court found that undisputed evidence showed Bank of America is a national banking association of which Marques was an officer whose termination was ratified by the Board of Directors (see *Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1103 (*Wells Fargo*)). It therefore ruled that all her claims were preempted by section 24 (Fifth). On appeal, Marques's main contention is that the NBA's "at pleasure" provision does not preempt claims based on a state antidiscrimination statutory scheme such as FEHA.

"Pre-emption may be either expressed or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' [Citations.]" (*Gade v. National Solid Wastes* (1992) 505 U.S. 88, 98.) Congressional intent to preempt state law is implicit in an actual, irreconcilable conflict between state and federal statutes, such that "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citations.]" (*Ibid.,* see also *Barnett Bank v. Nelson* (1996) 517 U.S. __ [116 S.Ct. 1103, 1108].)

"Nevertheless, pre-emption is not to be lightly presumed. [Citation.]" (*California Federal S. & L. Assn. v. Guerra* (1987) 479 U.S. 272, 281.) On the contrary, a party claiming preemption has the burden of overcoming the presumption against it. (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 937; *Chemical Specialties Mfrs. Ass'n., Inc. v. Allenby* (9th Cir. 1992) 958 F.2d 941, 943.) "The 'controlling principle' . . . is that 'any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause.' [Citation.]" (*Aalgaard v. Merchants Nat. Bank, Inc.* (1990) 224 Cal.App.3d 674, 688 (*Aalgaard*).)[1]

In *Aalgaard,* the court held that a FEHA action alleging age discrimination by a national banking association with fewer than 20 employees was preempted by section 24 (Fifth). (*Id* at p. 677.) In so doing, it rejected plaintiff's contention that the preemption doctrine was not applicable to his claim because Congress had enacted a comparable statute, the Age Discrimination in Employment Act (ADEA) (29 U.S.C. § 621 et seq.), banning age discrimination by employers of more than 20 persons, not excepting national banks (29 U.S.C. §§ 623, 630-(a) & (b)). (*Aalgaard, supra,* 224 Cal.App.3d at pp. 693694.) "By implication," the court admitted, "Congress arguably has decreed that national banks with 20 or more employees are bound by the federal age discrimination statute," but no such repeal by implication can be asserted as to smaller

---

1. Marques does not deny that this "conflict pre-emption" (*Gade v. National Solid Wastes, supra,* 505 U.S. at p. 98) bars both of her contract-based claims. (*Wells Fargo, supra,* 53 Cal.3d at pp. 1087-1088 ["It has been established for almost a century that section 24 preempts all state law causes of action by a bank officer for breach of an employment agreement."]; see also, *Mardula v. Rancho Dominguez Bank* (1996) 43 Cal.App.4th 790, 793 (*Mardula*).)

national banks. (*Id.* at p. 694.) Thus, the *Aalgaard* case does not foreclose the possibility that *state* discrimination claims against larger banks might not be preempted by the NBA to the extent they are cognizable under federal law.[2] The California Supreme Court has subsequently noted the issue, but said "we need not and do not decide this important and difficult question. [Citation.]" (In so doing, it summarized *Aalgaard's* holding as "state age discrimination preempted by section 24 discharge.") (*Wells Fargo, supra,* 53 Cal.3d at p. 1104.)

As noted in *Mardula, supra,* 43 Cal.App.4th at page 793, federal courts *have* considered the preemptive effect of federal dismissal-at-pleasure provisions (see *ante,* fn. 2) on state discrimination claims with varying results. For example, in *Ana Leon T. v. Federal Reserve Bank of Chicago* (6th Cir. 1987) 823 F.2d 928, 931 (*Ana Leon T.*), the court held the Federal Reserve Act's dismissal-at-pleasure provision preempted plaintiff's discriminatory discharge claim under Michigan's statutory scheme, although she could have brought it under Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. § 2000e et seq.). (See also *Osei-Bonsu v. Federal Home Loan Bank of New York* (S.D.N.Y. 1989) 726 F.Supp. 95, 97-98 [dismissal-at-pleasure provision of Federal Home Loan Bank Act deprives New York State Division of Human Rights of jurisdiction over discriminatory discharge claims]; *Kispert v. Federal Home Loan Bank* (S.D.Ohio 1991) 778 F.Supp. 950, 952-953 [following *Ana Leon T.*].)

---

2. "[T]he cases demonstrate that section 24, and similar provisions covering employees of Federal Reserve Banks (12 U.S.C. § 341) and federally chartered thrift institutions (12 U.S.C. § 1432(a))" do not "appear to bar claims that the discharge violated federal antidiscrimination statutes. [Citations.]" (*Mardula, supra,* 43 Cal.App.4th at p. 793, citing three federal district court decisions.) The Bank and its amicus assume arguendo that this is true.

On the other hand, in *Moodie v. Federal Reserve Bank of New York* (S.D.N.Y. 1993) 831 F.Supp. 333, 336 (*Moodie*), the court disagreed with *Ana Leon T.* because "the Sixth Circuit's pronouncement gives no basis for its opinion and sets forth no policy reasons for its holding." The district court found nothing in the Federal Reserve Act to support the view that Congress considered employment discrimination at the time of its enactment (*Moodie, supra,* 831 F.Supp. at p. 336), and nothing in the language of its dismissal-at-pleasure provision to support the view "that Congress intended that section to exempt the Federal Reserve Banks, in the area of employment discrimination, from statutes or regulations of the states in which they operate, particularly when the state statutory scheme is consistent with federal legislation." (*Id.* at p. 337.) The court held, therefore, that section 24 did not preempt New York State Human Rights Law claims. (*Ibid.;* see also *White v. Fed. Res. Bank* (Ohio App. 8 Dist. 1995) 660 N.E. 2d 493, 495496 [following *Moodie*].)

Marques would have us adopt the *Moodie* analysis, and hold that FEHA does not conflict with the National Bank Act's dismissal-at-pleasure provision, to the extent of its repeal by implication[3] by federal antidiscrimination law. She points out that not only do FEHA and Title VII have identical objectives (*Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1316), but their "procedures and remedies" are "wholly integrated and related" (*Salgado v. Atlantic Richfield Co.* (9th Cir. 1987) 823 F.2d 1322, 1325-1326). "Parallel state

3. Although repeal by implication is generally disfavored, it is justified "when the earlier and later statutes are irreconcilable." (*Morton v. Mancari* (1974) 417 U.S. 535, 549; see also *Traynor v. Turnage* (1988) 485 U.S. 535, 547-548 [earlier statute "submerged" if words of later statute would otherwise have no meaning].)

anti-discrimination laws are explicitly made part of Title VII's enforcement scheme. [Citations.]" (*Prudential Ins. Co. of America v. Lai* (9th Cir. 1994) 42 F.3d 1299, 1303, fn. 1.) Preemption of the former would thus "impair and modify" the latter (*Shaw v. Delta Air Lines, Inc.* (1983) 463 U.S. 85, 101-102), frustrating the hill and objectives of Congress, which include elimination of workplace discrimination.

The Bank counters that allowing claims of workplace discrimination under the law of 50 different states[4] would frustrate the goal of the NBA "to establish a national standard for the dismissal of bank officers which will preserve the public trust in the national banking system." It reasons that while federal antidiscrimination law conflicts with section 24 by limiting a national bank's absolute and unfettered right to terminate its officers' employment, the two can be harmonized — i.e., the NBA may be considered amended by implication (*St. Martin Lutheran Church v. South Dakota* (1981) 451 U.S. 772, 788) only because "the federal discrimination laws regulate the dismissal rights of national banks in the same manner as the NBA — they apply a uniform and predictable standard, adopted by Congress, to all national banks, regardless of where in the country the bank is located."

"To invoke the concept of 'uniformity,' however, is not to prove its need. [Citations.]" (*Atherton v. FDIC* (1997) 519 U.S. __ [117 S.Ct. 666, 671].) "The purpose of the [dismissal-at-pleasure] provision in the National Bank Act was to give those institutions the greatest latitude possible to hire and fire their chief operating officers, in order to maintain the

4. Despite the clear interdependence of federal and state antidiscrirnination laws, they differ in reach, remedies and remedial fore, as well as in certain procedural standards.

public trust." (*Mackey v. Pioneer Nat. Bank* (9th Cir. 1989) 867 F.2d 520, 526.) This purpose was explained in some detail over a century ago: "Observation and experience alike teach that it is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are intrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them. High credit is indispensable to the success and prosperity of a bank." (*Westervelt v. Mohrenstecher* (8th Cir. 1896) 76 F. 118, 122.) Even when a suspicion of dishonesty or carelessness proved unjustified, "it is necessary to the prosperity and success—to the very existence—of a banking institution that the board of directors should have power to remove such an officer, to put in his place another, in whom the community has confidence." (*Ibid.*)[5]

It may well be, as amicus California Bankers Association asserts, that "the power to dismiss a bank officer at will reflects the Congressional mandate to establish an independent national system in order to maintain the stability of, and promote the welfare of, national banks. [Citations.]" (*Alegria v. Idaho First Nat. Bank* (Idaho 1986) 723 P.2d 858, 860.) But once that power is diminished by Congress's determination to outlaw discriminatory terminations, it is hard to see how the public trust rationale mandates "a national standard for the dismissal of bank officers." The national standard enunciated by Congress in Title VII and the ADEA forbids dismissal on the basis of

5. Needless to say, public trust in a large financial institution such as the Bank of America is no longer based primarily on community confidence in the personal integrity of its individual of ricers. It is up to Congress, however, to decide whether the dismissal-at-pleasure provision has therefore become entirely obsolete. (See *Kemper v. First Nat. Bank in Newton* (III. App. 1981) 418 N.E.2d 819, 821.)

age, sex and national origin, precisely the three types of discrimination alleged here. The Congressional goal of eliminating workplace discrimination is not frustrated, but facilitated, by state antidiscrimination law such as FEHA.

Put another way, although national banks are "federal instrumentalities" (*Franklin Nat. Bank v. New York* (1954) 347 U.S. 373, 375) "and, as such, are subject to the paramount authority of federal law" (*ICBA v. Bd. of Governors of Federal Reserve System* (D.C.Cir. 1987) 820 F.2d 428, 436), states may nevertheless regulate them "where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers. [Citations.]" (*Barnett Bank v. Nelson, supra,* 517 U.S. [116 S.Ct. at p. 1109].) Since, under federal law, a national bank may no longer exercise the power to dismiss at pleasure an officer who can show her termination was discriminatory, state antidiscrimination statutes prohibiting such terminations are not preempted.

This resolution of the preemption issue may be approached in a different way but with the same conclusion. The Bank concedes that, of the three routes to preemption (express preemption, occupation of the field, and preemption by conflict), it can prevail only via the latter. Section 24 (Fifth) necessarily conflicts with the FEHA, it maintains. But, at least as to the subjects of the discrimination dealt with in *both* Title VII and the FEHA (and we reemphasize that this case concerns only such),[6] the enactment of Title VII in 1964 effectively vitiated any such conflict.[7] Subsequent to that enactment, there is simply

6. (See *Shaw v. Delta Air Lines, Inc., supra,* 463 U.S. at p. 103, fn. 24.)

7. The drafters of Title VII knew, too, how to legislate exemptions. Section 2000e-1, subdivisions (a) and (b), provide for limited exemptions with respect to aliens employed abroad, employees of religious organizations, etc.

no conflict between federal law (considered in its fullest sense) and California's FEHA.

In light of this holding, we need not address Marques's more specific contentions that (1) certain of her claims are beyond the scope of the Act because they do not arise out of, or relate to, her dismissal, and (2) her dismissal did not comply with the Act's requirements. Her claim that the trial court erred in failing to grant her a continuance to conduct further discovery (Code Civ. Proc., § 437c subd. (h)) is likewise moot, especially since the discovery she sought concerned the issue of the Bank's compliance with the Act's dismissal requirements.

B. *The Postjudgment Orders*

Marques contends the trial court abused its discretion in awarding the Bank its costs because an award to the prevailing defendant in a case such as this is governed not by Code of Civil Procedure sections 1032 and 1033.5, but by the stricter standard of Government Code section 12965, subdivision (b), an FEHA provision, as construed in *Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383. Our reversal of summary judgment in all but two of Marques's seven causes of action necessarily entails reversal of the costs award, rendering this issue moot.

Finally, Marques has demonstrated no abuse of discretion (*Dolan v. Buena Engineers, Inc.* (1994) 24 Cal.App.4th 1500, 1504) in the trial court's ruling that the Bank did not engage in sanctionable delaying tactics in producing the minutes of the Board of Director's meeting at which her dismissal was allegedly ratified.

Appendix A

IV. DISPOSITION

Summary judgment is affirmed as to the sixth and seventh (contract) causes of action (see *ante*, fn. 1). In all other respects, the judgment is reversed, and the cause remanded to the trial court for further proceedings in accordance with this opinion. The postjudgment order is affirmed as to denial of the motion for sanctions, but the trial court is directed to vacate the order insofar as it confirms the award of costs to the Bank as prevailing party. Marques is awarded her costs on appeal.

Kline, P.J., and Ruvolo, J., concurred.

APPENDIX B

ORDER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO FILED FEBRUARY 6, 1996

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF
SAN FRANCISCO

Case No. 966157

Date: February 5, 1996
Time: 9:30 a.m.
Dept.: 10
The Honorable David A. Garcia
Trial Date: April 15, 1996

VIRGINIA M. MARQUES,

Plaintiff,

v.

BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION; and DOES 1-XX, inclusive,

Defendant(s).

ORDER GRANTING DEFENDANT BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT

Defendant Bank of America National Trust and Savings Association's Motion for Summary Judgment came for hearing

on Monday, February 5, 1996 in Department 10 of the above entitled Court before the Honorable David A. Garcia. Patricia K. Gillette appeared as the attorney for Defendant Bank of America National Trust and Savings Association ("Defendant" or "the Bank") and Kathleen M. Lucas appeared as the attorney for Plaintiff Virginia Marques ("Plaintiff").

Upon consideration of the moving and opposition papers, the pleadings and files in this action, the arguments of counsel, and all other matters presented, it appears and this Court finds, pursuant to California Code of Civil Procedure Section 437c, that Defendant has shown by admissible evidence and reasonable inferences therefrom, not contradicted by other evidence or inferences, that Plaintiff's Complaint is without merit and must be dismissed in its entirety. This order is based on the grounds that:

I. ALL OF PLAINTIFF'S CLAIMS ARE PREEMPTED BY THE NATIONAL BANK ACT, 12 U.S.C. SECTION 24 (FIFTH)

There is no triable issue of fact that Plaintiff was an officer of the Bank under the National Bank Act or that the Board of Directors of the Bank promptly ratified Plaintiff's termination pursuant to the requirements of *Wells Fargo Bank v. Superior Court (Wertz)* (1991) 53 Cal. 3d 1082 based on the following undisputed material facts and supporting evidence:

Appendix B

Undisputed Facts:	*Supporting Evidence*:
1. The Bank is a national banking association.	1. Declaration of Cheryl Sorokin ("Sorokin Decl.") ¶ 2.
2. The position of Vice President is an officer position authorized by and identified in the Bank's bylaws.	2. Sorokin Decl. ¶ 3 and Exhs. A, B and C.
3. Plaintiff was appointed to the officer position of Vice President by the Bank's Board of Directors on December 7, 1992	3. Sorokin Decl. ¶ 4 and Exh. D; Deposition of Virginia Marques ("Marques Depo.") [at Exh. Q to Gillette Dec.] 239:15-241:4; Exh. R to Gillette Decl.
4. Plaintiff was authorized to perform and did perform duties as a Bank officer.	4. Sorokin Decl. ¶ 6 and Exhs. F-P; Marques Depo. (Gillette Decl. Exh. Q) 242:21-254:3; Exhs. S-W to Gillette Decl.
5. Plaintiff held the officer title of Vice President at the time of the termination of her employment.	5. Marques Depo. (Gillette Decl. Exh. Q) 242: 9-12; Exh. E to Sorokin Decl. at p. D001615.
6. Plaintiff's employment was terminated in September 1994.	6. Complaint ¶¶ 1 and 17; Exh. E to Sorokin Decl. at p. D001615; Elliott Decl. ¶¶ 4-7; and Exhs. 1-3.
7. Plaintiff's termination was ratified by the Bank's Board of Directors on November 7, 1994.	7. Sorokin Dec. ¶ 5 and Exh. E; Elliott Decl. ¶¶ 4-7; and Exhs. 1-3.

Appendix B

IT IS THEREFORE ORDERED, THAT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS GRANTED AND JUDGMENT IS ENTERED FOR DEFENDANT BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

Dated: February 5, 1996

s/ David A. Garcia
THE HONORABLE DAVID A. GARCIA
JUDGE OF THE SUPERIOR COURT

APPENDIX C

ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW FILED MARCH 11, 1998

First Appellate District, Division Two,
No. A073882/A074529
S066812

IN THE SUPREME COURT OF CALIFORNIA

VIRGINIA M. MARQUES,

Appellant

v.

BANK OF AMERICA NT & SA,

Respondent

Respondent's petition for review DENIED.

Baxter, J., and Chin, J., did not participate.

George
Chief Justice

APPENDIX D

STATUTORY PROVISIONS INVOLVED

NATIONAL BANK ACT

12 U.S.C. § 24 (1998)

§ 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate the [a national banking] association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power. . . .

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places. . . .

FEDERAL RESERVE BANK ACT

12 U.S.C. § 341 (1998)

§ 341. General enumeration of powers

Upon the filing of such [the organization] certificate with the Comptroller of the Currency as aforesaid a Federal reserve bank shall become a body corporate and as such, and in the name designated in such organization certificate, shall have power. . . .

Fifth. To appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided for in this Act, to define their duties, require bonds for them and fix the penalty thereof, and to dismiss at pleasure such officers or employees. . . .

FEDERAL HOME LOAN BANK ACT

12 U.S.C. § 1432 (1998)

§ 1432. Incorporation of banks; corporate powers; housing project loans

(a) The directors of each Federal Home Loan Bank shall in accordance with such rules and regulations as the Board may prescribe, make and file with the Board at the earliest practicable date after the establishment of such bank an organization certificate which shall contain such information as the Board may require. Upon the making and filing of such organization certificate with the Board, such bank shall become as of the date of the execution of its organization certificate, a body corporate, and as such and in its name as designated by the Board it shall have the power . . . to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of its business, subject to the approval of the Board; to define their duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents. . . .

Appendix D

FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT

29 U.S.C. § 623 (1998)

§ 623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to this compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act. . . .

§ 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement

of action under this chapter such action shall supersede any State action. . . .

FEDERAL EQUAL PAY ACT

29 U.S.C. § 206 (1998)

§ 206 Minimum wages

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee. . . .

Appendix D

§ 218. Relation to other laws

(a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter. . . .

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

42 U.S.C. § 2000e-2 (1998)

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. . . .

§ 2000e-7. Effect on State laws

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT

Cal. Gov't. Code § 12900 (1997)

§ 12900. Citation of part

This part may be known and referred to as the "California Fair Employment and Housing Act."

Appendix D

Cal. Gov't. Code § 12921 (1997)

§ 12921. Employment without discrimination as civil right

The opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex or age is hereby recognized as and declared to be a civil right.

CALIFORNIA EQUAL PAY ACT

Cal. Lab. Code § 1197.5 (1997)

§ 1197.5. Discrimination in payment on basis of sex; Administration and enforcement; Records; Civil actions

(a) No employer shall pay any individual in the employer's employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where the payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex.

(b) Any employer who violates subdivision (a) is liable to the employee affected in the amount of the

wages, and interest thereon, of which the employee is deprived by reason of the violation, and in an additional equal amount as liquidated damages. . . .